Solitaire Land Sdn Bhd v Hong Leong Bank Bhd

HIGH COURT (KUCHING) — CIVIL SUIT NO 22–181 OF 1999–I
CLEMENT SKINNER J
29 DECEMBER 2006

Banking — Banker and customer — Action by customer against banker — Term loan for RM2m was reduced — Bank acting on Bank Negara guideline — Whether there had been a breach of fiduciary and/or contractual duty

Contract — Agreement — Facility agreement — Allegations of breach of fiduciary and or contractual duty — Plaintiff accepted the reduced term loan — Whether plaintiff coerced to accept the reduced term loan

In 1997 the plaintiff wanted to develop a housing and commercial project. By a letter of offer dated 8 September 1997 the defendant approved banking facilities of RM4,000,000 to the plaintiff which the plaintiff duly accepted, consisting of; i) overdraft of RM2,000,000 and ii) term loan of RM2,000,000. By 17 October 1997 the overdraft facility of RM2,000,000 was fully disbursed to the plaintiff. The dispute between the parties centre around the term loan which was to part finance the earth filling, construction of retaining wall and infrastructure works on the said lands. Some two months after the plaintiff approved the banking facilities, Bank Negara issued a guideline to all Banking Institutions ('the Bank Negara guideline'). Acting on the Bank Negara guideline, the defendant decided to cancel the term loan of RM2,000,000 granted to the plaintiff. On being so informed, the plaintiff informed the defendant that earthworks on the said lands were ongoing and that the plaintiff was about to request for a drawdown of RM564,000 of the term loan to pay its earthworks contractor. The defendant approved the plaintiff's request to be allowed to utilise the term loan up to RM500,000. The plaintiff accepted the reduced term loan and the terms on which it was offered. It is the plaintiff's case that in cancelling the term loan facility and then reducing it to RM500,000 the defendant was in breach of its fiduciary and or contractual duty to the plaintiff. The plaintiff's claim against the defendant for RM6,942,459 as loss of profits and RM2,500,000 as loss in the value of the said lands. The defendant denied that it had caused any loss to the plaintiff as alleged because the defendant said that even if the plaintiff had completed the earthworks on the said land, the plaintiff was not in a position to commence construction works on the said project as the necessary approvals and permits to do so had already lapsed.

Held:

(1) As a matter of law and on the facts, the Bank Negara guidelines applied to the

plaintiff's project. The guideline issued on 16 December 1997 was certainly a limitation imposed on the ability of financial institutions such as the defendant to freely give out loans to the property sector. Clearly the defendant was obliged to comply with the guideline. Otherwise, it was in danger of being punished with imprisonment or a fine for not complying with it. It mattered not whether the guideline was couched in directory or mandatory language (see para 35).

(2) The plaintiff had not lawfully started construction of its project. The question whether construction has or has not started plays a pivotal role on how a bank is to be guided. The particular words used in the guidelines are 'where constructions has not started' and 'construction has started', but more relevant to the issue at hand is what meaning is to be ascribed to these words. Where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred (see *The Interpretation of Contracts*, 2nd Edn, by Kim Lawison QC) (see paras 36–40).

(3) As any company wishing to undertake a housing development will know, planning and building approvals must be obtained from the relevant authorities before any construction works can begin. Section 3(2) of the Building Ordinance 1994 stipulates that no person shall erect any building unless approval of the site plan has been granted by the competent planning authority under s 8(4). The plaintiff did not produce any of the approvals (see paras 41, 44 & 47).

[Bahasa Malaysia summary

Pada tahun 1997, plaintif ingin mengusahakan satu projek pembangunan perumahan dan komersial. Melalui satu surat tawaran bertarikh 8 September 1997 defendan meluluskan kemudahan pembankan sebayak RM4,000,000 kepada plaintif di mana plaintif telah menerimanya, yang terdiri daripada: (i) overdraf sebanyak RM2,000,000; dan (ii) pinjaman terma sebanyak RM2,000,000. Pada 17 Oktober 1997 kemudahan overdraf sebanyak RM2,000,000 telah dibayar sepenuhnya kepada plaintif. Pertikaian di antara pihak-pihak bertumpu kepada pinjaman terma yang digunakan untuk membiayai penimbunan tanah, pembinaan tembok penahanan dan kerja-kerja infrastruktur di tanah-tanah tersebut. Lebih kurang dua bulan selepas plaintif meluluskan kemudahan perbankan tersebut, Bank Negara telah mengeluarkan satu garis panduan kepada semua institusi-institusi kewangan ('garis panduan Bank Negara tersebut'). Bertindak atas garis panduan Bank Negara tersebut, defendan memutuskan untuk membatalkan pinjaman terma RM2,000,000 tersebut yang diberikan kepada plaintif. Setelah dimaklumkan, plaintif telah memberitahu defendan bahawa kerja-kerja tanah di tanah-tanah tersebut telahpun dijalankan dan plaintif hendak meminta bayaran daripada pinjaman terma tersebut sebanyak RM564,000 untuk membayar kontraktor kerja-kerja tanahnya. Defendan telah meluluskan permintaan plaintif untuk dibenarkan menggunakan pinjaman terma sehingga RM500,000. Plaintif menerima pinjaman terma yang dikurangkan tersebut bersama dengan terma-terma yang ditawarkan. Adalah menjadi kes plaintif bahawa dalam pembatalan pinjaman terma dan mengurangkannya kepada RM500,000 defendan telah melanggar kewajipan fidusiarinya dan atau

kewajipan kontraktualnya kepada plaintif. Plaintif menuntut terhadap defendan jumlah RM6,942,459 untuk kerugian keuntungan dan RM2,500,000 untuk kehilangan nilai tanah-tanah tersebut. Defendan menafikan bahawa ia telah mengakibatkan kehilangan kepada plaintif seperti yang dikatakan oleh kerana defendan menyatakan bahawa walaupun sekiranya plaintif telah menyiapkan kerja-kerja tanah di tanah tersebut, plaintif tidak berada dalam keadaan untuk memulakan kerja-kerja pembinaan di projek tersebut oleh kerana keperluan kelulusan-kelulusan dan permit-permit telah pun luput.

Diputuskan:

(1) Berdasarkan undang-undang dan fakta-fakta, garis panduan Bank Negara tersebut adalah terpakai kepada projek plaintif. Garis panduan yang dikeluarkan pada 16 Disember 1997 adalah nyata satu had yang sememangnya dikenakan atas kemampuan institusi-institusi kewangan seperti defendan untuk dengan bebasnya memberikan pinjaman kepada sektor hartanah. Adalah jelas defendan di bawah satu obligasi untuk mematuhi garis panduan tersebut. Sekiranya tidak, ia berkemungkinan dihukum dengan pemenjaraan atau pun didenda atas kegagalan mematuhinya. Ia tidak menjadi masalah sama ada garis panduan tersebut ditulis sebagai arahan atau mandatori (lihat perenggan 35).

(2) Plaintif tidak memulakan pembinaan projeknya secara sah. Soalan sama ada pembinaan telah atau belum bermula memainkan peranan yang penting bagaimana bank harus diberi panduan. Perkataan-perkataan tertentu yang digunakan di garis panduan tersebut adalah 'di mana pembinaan belum lagi bermula' dan 'pembinaan telah bermula', tetapi apa yang lebih relevan kepada isu sekarang ialah apakah maksud yang dianggap oleh perkataan-perkataan ini. Di mana perkataan-perkataan di satu-satu kontrak yang mempunyai dua maksud, satu adalah sah dan satu lagi tidak sah, yang sah patut dilayan (lihat *The Interpretation of Contracts*, 2nd Edn, by Kim Lawison QC) (lihat perenggan 36–40)

(3) Seperti mana-mana syarikat yang ingin menjalankan pembangunan perumahan akan tahu, kelulusan-kelulusan pelan dan bangunan mesti diperolehi daripada pihak-pihak berkuasa yang relevan sebelum kerja pembinaan dapat dimulakan. Seksyen 3(2) Ordinan Bangunan 1994 memperuntukkan bahawa tiada siapa dibenarkan membina sebarang bangunan kecuali melalui pelan tapak yang diluluskan oleh pihak berkuasa perancangan yang kompeten di bawah s 8(4). Plaintif tidak mengemukakan sebarang kelulusan tersebut (lihat perenggan 41, 44 & 47).]

Notes

For cases on action by customer against banker, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1800–1804.

For cases on facility agreement, see 3(1) *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2136–2138.

Cases referred to

Bank Bumiputra Malaysia Bhd, Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors [1993] 2 MLJ 76 (SC) (refd)

Cantor Art Services Ltd v Kenneth Bieber Photographic Ltd [1969] 1 WLR 1226 (CA) (refd)

Legislation referred to

Banking and Financial Institutions Act 1980 ss 67(a)(ii), 103(1)(b)
Building Ordinance 1994 ss 2(1), 3(2), 8(12(a), (20)
Evidence Act 1950 s 114(g)
Land (Control of Subdivision) Ordinance (Cap 82) ss 3(2), 9(3)

Wong Ho Leng (Wong Ho Leng & Co) for the plaintiff.
Franck Tang (Tang & Partners) for the defendant.

Clement Skinner J:

[1] This suit arose as a result of the financial crisis that affected the economies of the East Asian countries, including Malaysia, in 1997.

THE FACTS

[2] The following facts have either been agreed to or I have found them to be so from the evidence presented to the court.

[3] The plaintiff is a company incorporated and registered with limited liability in Malaysia under the Companies Act 1965.

[4] In 1997 the plaintiff wanted to develop a housing and commercial project on three parcels of land measuring in all some 23 acres ('the said lands') in Kuching, Sarawak. The said lands were registered in the name of a company called Pradom Development Sdn Bhd ('Pradom'), The evidence shows that the plaintiff had purchased the said lands from Pradom on 1 July 1997 but did not transfer the said lands into its own name. Pradom had also granted a power of attorney to the plaintiff in respect of the said lands. The housing project was initially to consist of some 15 units detached houses, 28 units semi-detached houses, 155 units terrace houses and seven units of shophouses ('the said project').

[5] The plaintiff through one of its directors Mr Pang Neng Ung ('Mr Pang') together with its lawyer Mr Raymond Kueh ('the plaintiffs lawyer') approached the branch office at Kuching of the defendant, a licensed bank incorporated in Malaysia with a registered address at Level 5, Wisma Hong Leong No 18, Jalan Perak, Kuala Lumpur, to obtain finance for a part only of the said project.

[6] By a letter of offer dated 8 September 1997 the defendant approved banking facilities of RM4,000,000 to the plaintiff which the plaintiff duly accepted, consisting of:

(a) Overdraft of RM2,000,000 and

(b) Term Loan of RM2,000,000.

The purpose of the facility was for the following:

Overdraft:

For working capital requirements and to redeem properties from Hock Hua Bank (Sabah) Berhad and to part finance preliminaries costs.

Term Loan:

To part finance earth filling, construction of retaining wall and infrastructure.

[7] As security for the banking facilities the defendant obtained the following; A memorandum of charge over the said lands and a facility agreement executed by the plaintiff ('the facility agreement'), both of which documents were dated 25 September 1999. The plaintiff also obtained a guarantee from two directors of the plaintiff, namely, Mr Pang Neng Ung and Mr Chua Yap Beng.

[8] By 17 October 1997 the overdraft facility of RM2,000,000 was fully disbursed to the plaintiff. No issue has arisen between the parties about this facility.

[9] The dispute between the parties centre around the term loan which, as I mentioned a moment ago, was to part finance the earth filling, construction of retaining wall and infrastructure works on the said lands.

[10] Some two months after the plaintiff was approved the banking facilities Bank Negara Malaysia, in December of 1997, put in place a raft of measures to restore macroeconomic stability to our economy against the financial storm that was then raging across the whole of the region. One such measure concerned tightening control of money lent by financial institutions to the property sector.

[11] On 16 December 1997 Bank Negara issued a guideline to all Banking Institutions ('the Bank Negara guideline'). Since this guideline lies at the heart of this case I will set it out here. It reads:

Lending to Property Sector

The Minister of Finance had on 5 December 1997 announced a package of measures to restore macroeconomic stability, including the policy stance on bank credit to the property sector.

2. The purpose of this circular is to elaborate on this policy stance for the guidance of banking institutions.

3. At a time when liquidity in the banking system is tight, the available liquidity must be used for purposes that maximise its benefit to the economy. To a large extent, the overall strength of the economy will be dependent on the continued growth of the productive and

export sectors. Therefore, these sectors should have priority access to credit. Thus, credit of banking institutions should be channelled mainly to productive sectors of the economy that will boost exports and foreign exchange earnings.

4. Banking institutions are required to use their discretion in a judicious manner to deny credit for less-productive activities and be very selective in lending to the property sector, to free up resources for directly productive and export-related activities.

5. Banking institutions should be guided by the following principles in channelling loans to the property sector:

(i) No credit facilities should be granted to property projects where construction has not started, including for the construction of low and medium cost residential properties costing RM150,000 and below;

(ii) For property projects where construction has started, banking institutions should assess the viability for such projects under the changed economic conditions. Under strict selectivity, credit could be extended for the construction and purchase of residential properties costing RM150,000 and below. Other projects should preferably be deferred. Where such projects are no longer viable under the changed economic conditions, banking institutions should review the projects and their financing; and

(iii) Notwithstanding the above, banking institutions may continue to extend credit for the construction and extension of factories and industrial buildings which are needed to expand productive capacity.

6. Banking institutions are also reminded to adhere strictly to their respective credit plans and the guidelines on lending to the broad property sector announced by Bank Negara Malaysia in March this year. It should be emphasised that these guidelines for lending to the property sector are being regularly reviewed and will be rescinded when they are no longer needed.

Bank Negara Malaysia

16 Disember 1997

[12] Acting on the Bank Negara guideline, the defendant's Credit Evaluation Department decided to cancel the term loan of RM2,000,000 granted to the plaintiff. That decision was conveyed to the defendant's branch office at Kuching sometime between 29 December 1997 and 2 January 1998 whereupon the Branch Manager Mr Alfred Wong Pak Sing ('Mr Wong') immediately telephoned Mr Pang to inform him of the decision.

[13] On being so informed, Mr Pang in turn informed Mr Wong that earthworks on the said lands were ongong and that the plaintiff was about to request for a drawdown of RM564,000 of the term loan to pay its earthworks contractor. According to Mr Wong, and I accept his evidence on this point, Mr Pang requested for his (Mr Wong's) assistance to appeal to his Head Office to allow the plaintiff to drawdown RM500,000 to enable it to pay its earthworks contractor instead of cancelling the term loan facility. Mr Wong immediately took up Mr Pang's appeal with his Head Office.

[14] While awaiting a decision from his Head Office, Mr Wong received a letter from the plaintiffs lawyer dated 23 January 1998 requesting to drawdown RM564,000 as the plaintiff had completed the earthworks and enclosing supporting documents with the claim.

[15] The defendant's Head Office approved the plaintiffs request to be allowed to utilise the term loan up to RM500,000. So on 9 February 1998 Mr Wong wrote a letter to the plaintiff informing it of the reduction of its term loan to RM500,000. Since a dispute has arisen between the parties about this letter, I will set it out in full and the part of this letter on which an issue has been raised is identified in italics. It reads:

Date: 9 February 1998

M/s Solitaire Land Sdn Bhd

No 6 (Lot 2178 (BID),

Kemena Jaya Commercial Centre,

Jalan Sultan Iskandar, Bintulu.

(Attn: Mr Pang Neng Ung)

Dear Sir

RE: REDUCTION OF TERM LOAN

We refer to our Letter of Offer dated 8th September 1997 and regret to inform you that *in line with Bank Negara's guideline dated l6 December 1997*, your term loan facility of RM2,000,000 is reduced to RM500,000 with immediate effect.

The term loan of RM500,000 is repayable over a period of six years by 72 monthly instalment of RM9,998 each inclusive of interest. The term loan will be fully released to you to part finance the earthwork. The first instalment repayment shall commence on the first day of the month following the month of full release. Subsequent instalments shall be due and payable on the first day of each successive month.

The redemption sum for the subdivided individual titles/sublots shall also include reduction of your Overdraft facility of RM2,000,000. Your account will be reviewed again in six months' time.

Kindly indicate your acceptance of the above terms and conditions by signing and returning to us the duplicate copy of this letter.

Thank you for banking with us.

Yours faithfully,

For HONG LEONG BANK BERHAD

Jalan Pending Branch, Kuching

(SGD): Alfred Wong Pak Sing, Branch Manager

cc Credit Administration Department, Head Office

[16] When the plaintiff was informed of the defendant's decision regarding its term loan, the plaintiff was not supplied a copy of Bank Negara's guideline and according to Mr Wong, which I accept, nor did the plaintiff request for a copy of the same even though Mr Pang says he did.

[17] The plaintiff accepted the reduced term loan and the terms on which it was offered. Its acceptance was signified on the duplicate copy of the defendant's letter of 9 February 1998 by Mr Pang and another director, Mr Dennis Lau, appending their signatures on the duplicate copy. A dispute has arisen on this aspect of the case.

[18] On 13 December 1998 the defendant released the sum of RM500,000 to the plaintiffs lawyer. Thereafter, for the next five months the plaintiff paid without any query or protest the revised monthly instalments of RM9,000 in repayment of the reduced term loan until May 1999.

[19] On 24 March 1999 the plaintiff wrote to the defendant requesting it to restructure its overdraft facility which was then some RM79,619.94 in excess of its limit. On 13 April 1999 the plaintiff also wrote to the defendant requesting for a loan of RM1,700,000 to finance the working of a subsidiary company called Nasteel Industries Sdn Bhd, ('Nasteel') which was involved in manufacturing wire mesh, and which the plaintiff had incorporated as part of its business diversification process.

[20] On 6 May 1999 the defendant informed the plaintiff that as far as its overdraft facility was concerned, it would allow the plaintiff to convert a sum of RM77,000 (being the amount in excess of the overdraft limit) to be converted into a term loan repayable over 24 months at a rate of interest at 2% per annum, but the plaintiff refused the defendant's offer. As far as the loan to Nasteel was concerned, the defendant refused to grant the same.

[21] Sometime in June 1999, the plaintiff decided to abandon the said project but incorporated another company called Besthouse Development (M) Sdn Bhd ('Besthouse') to undertake the said project. The two largest shareholders in Besthouse were Mr Pang and Mr Chua Yap Beng respectively. To this end, on 28 June 1999 the plaintiff as attorney of Pradom sold the said lands to a company called Ingming Holdings Sdn Bhd ('Ingming'), which was a company owned by Mr Pang's family, for RM3,000,000.

[22] On 1 July 1999, Ingming caused Pradom to transfer the said lands to Besthouse as its (Ingming's) nominee.

[23] To obtain financing for Besthouse to undertake the said project, Mr Pang approached Maybank Finance. It was then that one of the managers at Maybank Finance showed the Bank Negara guideline to Mr Pang and informed him that the guidelines did not require the defendant to cancel or withdraw or reduce the term loan facility.

[24] On 30 July 1999 the defendant's branch office at Kuching received a letter from the plaintiffs lawyer dated 28 July 1999 informing the defendant that his client (the plaintiff) *had recently discovered* that Bank Negara's guideline never required the defendant *to release/disburse only 25% of banking facilities to borrowers with immediate effect*. The letter then went on to accuse the defendant of wrongfully and in breach of its contract reducing the term loan facility, and of misrepresentation. A demand was also made for the defendant to pay the plaintiff RM6,942,459 as loss of profits and RM2,500,000 as loss in the value of the said lands within seven days of that letter failing which legal action would be instituted against the defendant.

[25] The defendant replied through its own lawyers denying the allegations and maintaining that it was entitled to do what it did. On 11 August 1999 the defendant received a letter from the plaintiffs lawyer informing the defendant that the plaintiff would redeem the charge over the said lands under protest and demanded that the defendant produce Bank Negara's guideline, but this the defendant declined to do.

[26] On 21 September 1999 the plaintiff commenced this action but it did not serve the writ on the defendant until January 2000. In the meantime the plaintiff wrote several letters of complaint against the defendant to Bank Negara.

THE CLAIM

[27] By this action the plaintiff claims against the defendant the following:

(1) By way of special damages

  (a) loss of profits in the sum of RM6,942,459;

  (b) loss of value of land in the sum of RM2,500,000;

(2) general damages;

(3) interest;

(4) costs.

THE CONTENTIONS

[28] It is the plaintiffs case that in cancelling the term loan facility and then reducing it to RM500,000 the defendant was in breach of its fiduciary and or contractual duty to the plaintiff. The plaintiff also alleges that the defendant had misrepresented to the plaintiff that in doing what it did, the defendant had acted in line with the Bank Negara guideline. The plaintiff further alleges that the defendant had forced, coerced, exerted severe economic pressure, duress and undue influence on the plaintiff to accept the reduced term loan of RM500,000 offered to it through the

defendant's letter of 9 February 1998. The plaintiff says that as a result of the defendant's breach and wrongful acts, it ('the plaintiff) was forced to abandon the said project at the end of June 1999, thereby causing it to suffer the loss and damages it now seeks to recover by this action.

[29] The defendant denies the plaintiffs claim and the allegations made against it. It is the defendant's case that the plaintiffs project came within the purview of Bank Negara's guideline and that under s 16.03 of the facilities agreement, it was within the defendant's right to review, reduce or cancel the term loan facility in compliance with Bank Negara's guideline, which it did, having noted that construction works had not started. The defendant says that the plaintiff, having accepted the reduced term loan facility of RM500,000 offered to it following its appeal to the defendant, the plaintiff should be estopped from contending that it was coerced into accepting the reduced facility. The defendant further denies that it had caused any loss to the plaintiff as alleged because the defendant says that even if the plaintiff had completed the earthworks on the said land, the plaintiff was not in a position to commence construction works on the said project as the necessary approvals and permits to do so had already lapsed. Further, the losses which the plaintiff claims it suffered were either caused by its own decision to allow Besthouse to undertake the revised project or it had deliberately sold the said lands at a loss to generate this claim against the defendant.

[30] At the trial the plaintiff called only one witness Mr Pang (PW1), while the defendant called 3 witnesses, namely, the Branch Manager Mr Wong (DW1), a registered valuer Mr Chieng Yu Tang (DW2) and a Quantify Surveyor Ms Lim Lai Fun (DW3).

ISSUES TO BE TRIED

[31] The parties agreed that the following were the issues to be tried:

(1) whether the defendant had wrongfully reduced the term Loan facility of RM2,000,000 to RM500,000 by misrepresentation through its letter dated 9 February 1998 that 'in line with Bank Negara Malaysia's guidelines dated 16 December 1997, your term loan facility of RM2,000,000 is reduced to RM500,000 with immediate effect?;

(2) whether the defendant was entitled by s 16.03 of the facilities agreement dated 25 September 1997 to cancel or reduce the term loan facility in compliance with Bank Negara Malaysia's guidelines issued to Banking Institutions on 16 December 1997?;

(3) whether Bank Negara Malaysia's guidelines issued on 16 December 1997 apply to the defendant's project?;

(4) whether at the time of the reduction of the term loan facility, (i) the plaintiff intended to or was in the position to commence construction works on the project or (ii) whether the project was then an ongoing project or viable in the changed economic conditions?;

(5) whether the defendant had forced and/or coerced the plaintiffs director, Mr Pang Neng Ung to sign on the defendant's letter dated 9 February 1998 at the defendant's manager's office at Jalan Pending by exerting severe economic pressure/duress and/or undue influence and/or force that if the plaintiff refused to sign the defendant's said letter dated 9 February 1998 the defendant will not disburse any money at all regarding the plaintiffs claim for drawndown of RM564,000 under the term loan facility for the earth filling works?;

(6) whether the defendant had made any representation to the plaintiff on the Bank Negara Malaysia's guidelines and if so, whether the said representation was false and made by the defendant negligently and/or fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false?;

(7) if the defendant had made any representation to the plaintiff on Bank Negara Malaysia's guidelines which was false, did the plaintiff rely or act on the said representation and was thereby induced to sign the defendant's said letter dated 9 February 1998 or did the plaintiff sign the said letter relying on its own judgment of the economic circumstances and on the information on the Ministry of Finance economic measures received from the mass media?;

(8) whether the defendant as a banker has breached its fiduciary and contractual duties to the plaintiff as a customer?;

(9) whether the plaintiff is estopped by its unconditional acceptance of the reduction of the term loan facility and by its conduct in paying the monthly instalments of RM9,998 promptly until May 1999 and in applying for the restructuring of the overdraft facility vide its letter dated 24 March 1998 from claiming that the defendant had breached its fiduciary and/or contractual duties as bankers to the plaintiff?;

(10) whether the transfer of the said lands on or about 7 January 2000 from Pradom Development Sdn Bhd to Besthouse Development (M) Sdn Bhd was a bona fide arm's length sale-transaction?;

(11) did the defendant's reduction of the term loan facility result in or force the plaintiff to abandon the project sometime at or about end of June 1999?; and

(12) whether the plaintiff had suffered the special damages claimed and/or any damages at all?

I will now address each of the issues although not in the order they were stated by the parties.

ISSUE NO 3

Whether Bank Negara's guidelines dated 16 December 1997 apply to the plaintiffs project?

[32] It was the submission of the plaintiff that the guidelines being guidelines, are merely directory and not mandatory. According to the plaintiff indication of its lack of mandatories is afforded by the words 'should be guided'. In any event, the plaintiff contended that the said guidelines did not apply to the plaintiffs project as the plaintiff had already started construction on its project, According to the plaintiff,

it had carried out earth filling and site clearing works which, though preparatory, were nevertheless part and parcel of the construction works.

[33] I do not agree with these contentions. I find that as a matter of law and on the facts, the Bank Negara guidelines applied to the plaintiffs project, and for the reasons stated shortly, the plaintiff had not lawfully commenced construction on its project.

[34] As far as the law is concerned, s 67(a)(ii) of the Banking and Financial Institutions Act 1980 ('BAFIA') authorises Bank Negara to specify limitations, terms and conditions in respect of the giving of any class, category or description of credit facilities to be given by any licensed institution, including the giving of any credit facilities for the purpose of financing the purchase or development of immovable property and by s 103(1)(b) of BAFIA, any person who contravenes any specification or requirement made, or any order in writing, direction, instruction, or notice, given, or any limit, term, condition or restriction imposed, or any power conferred under, pursuant to, or by virtue of any provision of BAFIA, set out in the third column of the Fourth Schedule (which includes s 67), shall be guilty of an offence and liable to imprisonment of five years and or fine of RM5m.

[35] In my judgment the guideline issued on 16 December 1997 was certainly a limitation imposed on the ability of financial institutions such as the defendant to freely give out loans to the property sector. Clearly the defendant was obliged to comply with the guideline. Otherwise, it was in danger of being punished with imprisonment or a fine for not complying with it. Accordingly, I agree with counsel for the defendant that it mattered not whether the guideline was couched in directory or mandatory language.

[36] On the facts, the plaintiff sought to argue that the guideline of 16 December 1997 did not apply to it as it had already 'started construction' of its project because it had completed its earth filling and site clearing works. I do not agree. I find that the plaintiff had not lawfully started construction of its project for the following reasons.

[37] The part of the guideline which is relevant to the issue at hand is para 5 which reads:

> 5. Banking institutions should be guided by the following principles in channelling loans to the property sector:
>
> (i) No credit facilities should be granted to property projects where construction has not started, including for the construction of low and medium cost residential properties costing RM150,000 and below;
>
> (ii) For property projects where construction has started, banking institutions should assess the viability for such projects under the changed economic conditions. Under strict selectivity, credit could be extended for the construction and purchase of residential properties costing RM150,000 and below. Other projects should preferably be deferred. Where such projects are no longer viable under the changed economic conditions, banking institutions should review the projects and their financing; and

[38] It will be seen that in both paragraphs, the question whether construction has or has not started plays a pivotal role on how a bank is to be guided. The particular words used in the guidelines are *where constructions has not storied* and *construction has started* which appear in both para 5(i) and (ii), but more relevant to the issue at hand is what meaning is to be ascribed to these words.

[39] Mr Frank Tang of counsel for the defendant submits, and I agree with him, that in interpreting these words, I should, in accordance with an accepted canon of construction, give to them a construction so as to be lawful. In *Cantor Art Services Ltd v Kenneth Bieber Photographic Ltd* [1969] 1 WLR 1226 (CA), a contract for the assignment of a lease provided that if licence to assign was delayed beyond a certain date, the purchaser would pay the purchase price to the vendor and the vendor would *thereupon allow the purchaser to enter into occupation pending completion* and the purchaser would pay the rent and other outgoings. It was held that *allow* meant *lawfully allow* and consequently did not cover entry into occupation in breach of covenant.

[40] I also refer to *The Interpretation of Contracts* (2nd Ed) by Kim Lawison QC where at p 177 the learned author states that where the words of a contract are capable of two meanings, one of which is lawful and the other unlawful, the former construction should be preferred.

[41] As any company wishing to undertake a housing development will know, planning and building approvals must be obtained from the relevant authorities before any construction works can begin.

[42] Now, since the plaintiff claims that its earth works, though preparatory, were nevertheless part and parcel of the construction works of the project, the question that needs to be asked is: Did the plaintiff have valid approvals for its project?

[43] Mr Tang submits, and I agree with him, that in Sarawak, the property development industry in 1997 was regulated by the Land Code (Cap 81), the Land (Control of Subdivision) Ordinance Cap 82 (now repealed) and the Buildings Ordinance 1994.

[44] Section 3(2) of the Building Ordinance 1994 stipulates that no person shall erect any building unless approval of the site plan has been granted by the competent planning authority under s 8(4). And *competent planning authority* is defined in s 2(1) as the Director of Land & Survey and includes any person by whom the powers conferred on the Director of Land & Survey under the Land (Control of Subdivision) Ordinance may be exercised, s 8(1) of the same Ordinance states that no person shall erect any building without the prior written permission of the local authority and s 8(2) provides that any person who intends to erect any building shall submit plans and specifications to the local authority for approval.

[45] And s 8(12)(a) of the same Ordinance provides that no person shall commence the erection of a building unless such work is commenced within

12 months from the date on which the plans and specifications of such building were approved by the local authority and he has given four clear days' notice in writing of his intention to commence such works.

[46] Then s 8(17) of the same Ordinance provides that any person who contravenes the above sections shall be guilty of an offence and be subject to a fine of RM2,000 and in the case of a continuing offence to imprisonment of 1 year and a fine of RM200 per day. Further, by s 8(20) it is stated that for the purposes of this section, ie s 8 and s 13, a person shall *be deemed to erect a building* who inter alia, *begins work on the site thereof* for or in respect of a new building (my emphasis).

[47] The plaintiff did not produce any of the approvals just referred to. Instead, the plaintiff produced a letter dated 7 December 1982 signed by the Land and Survey Department Kuching approving AVTC and subdivision of the said lands. Mr Pang (PW1) went on to say in his evidence *that it was the practice then* that if within 12 months of such approval the engineering drawings were submitted, then the approval would not lapse. Mr Pang then said the engineering plans were submitted and approved by a letter dated 16 June 1986 from the Land and Survey Department (which was produced).

[48] Mr Pang further testified that by a letter dated 20 June 1987 the Land and Survey Department Kuching informed M/S AMB Akitek that it had no planning objection, to inter alia, dividing the development into three phases, and, that by another letter dated 19 July 1989, Pradom was informed by M/S AMB Akitek that there was no time limit for the approval of this housing project. So according to the plaintiff it had all the necessary approvals to commence construction on the said lands which would include the earthworks thereon.

[49] I do not agree. Neither Mr Pang nor the letter of AMB Akitek gave any basis for saying that in 1997, there existed such a practice as was referred to or for there being no time limit for the approval of the housing development. Apart from the *ipse dixit* of Mr Pang, no evidence was led to establish that there was such a practice as referred to and which authority recognised such a practice, Besides, there is no evidence adduced even that the Engineering plans were submitted before 7 December 1983, ie the expiry date of the approval. In fact Mr Pang agreed during his cross-examination that from what was stated in a letter from the Land and Survey Department dated 20 March 1998 that the building plans could not be proceeded with because the Land and Survey Department required amendments to the engineering plan because the road levels had increased.

[50] I find there could not have been any such practice as referred to or that there was an unlimited life span for an approval in light of the letter of the Lands & Survey dated 7 December 1982 approving the AVTC and subdivision of the said lands which granted the approval on the express condition that *this approval is valid for a period of one year only*.

[51] Further the alleged practice that was alluded to by Mr Pang is also inconsistent with the conditions stated in the approval from Land and Survey dated 7 December

1982 and the provisions of s 9(3) of the Land (Control of Subdivision) Ordinance (Cap 82), ss 3(2), 8(12)(a) and 8(20) of the Building Ordinance 1994.

[52] Counsel for the plaintiff submitted that if the AVTC and Subdivision approval had lapsed, there is no reason for the Land and Survey Department to issue other letters of approval, but I am not persuaded by such argument in the light of the express condition in the letter of approval dated 7 December 1982 that the approval is valid for one year only, and, the express provisions in the laws earlier referred to.

[53] Accordingly I hold that the words 'where construction has not started' or 'where construction has started' appearing in para 5 (i) and (ii) of the guideline must be construed to mean 'where construction has not lawfully started' or 'where construction has lawfully started' as the case may be, and the plaintiff has not been able to show that the construction on the said lands had lawfully started at the time the defendant initially cancelled and then reduced the term loan.

[54] Counsel for the plaintiff submitted that the defendant cannot rely on the Building Ordinance 1994 as it was not pleaded in the defence. I do not agree. The issue before me is not a point of pleading. Here the Building Ordinance has become relevant in deciding whether the plaintiffs contention that it had the necessary approvals to start construction on the said lands can be sustained or not. I see no reason why the defendant cannot rely on the Ordinance in deciding the issue before the court.

[55] It was further submitted on behalf of the plaintiff that the defendant should be estopped from taking the point about the approved plans because when the defendant disbursed the reduced sum of RM500,000 to the plaintiff, the defendant never asked to see the approved plans and so this must be taken as evidence that valid approvals of the plans were not required for the disbursement of the term loan facility.

[56] I do not agree. In my view a distinction must be drawn on the one hand between the plaintiffs obligation to comply with all laws governing the commencement of any construction works on the said lands, in respect of which there can be no waiver or estoppel, and on the other hand a purely private contractual undertaking given by the plaintiff to the defendant under s 3.01 of the facility agreement that all consents, approvals or authorisations of any relevant authority have been obtained. Such a provision is for the benefit and protection of the defendant. If the defendant wished to waive it or grant the plaintiff a relaxation of it, it was fully entitled to do so under s 5.03 of the facility agreement without prejudice to any of its rights and such waiver would not preclude the defendant from insisting on the plaintiffs compliance with the waived term at a subsequent time. Accordingly the defendant is not estopped from taking the point about the valid approvals.

[57] For all the above reasons I find that the first issue must be answered in the affirmative.

ISSUE NO 2

Whether the defendant was entitled by s 16.03 of the facilities agreement dated 25 September 1997 to cancel or reduce the term loan facility in compliance with Bank Negara's guideline issued to banking institutions on 16 December 1997?

[58] For convenience s 16.03 of the facilities agreement is set out below. I have highlighted those parts of it which I consider to be relevant to the issue at hand:

> (1) Notwithstanding any provision to the contrary herein, in the event that by reason of the enactment of or the making of any change in any applicable law, regulation or *regulatory requirement* or in the interpretation or application thereof or the *making of any request or direction from or requirement of Bank Negara Malaysia* or other fiscal or monetary authority *(whether or not having the force of law), the Lender shall be of the opinion* that it has or will become unlawful or it is otherwise prevented for it to maintain or give effect to all or any of its obligations as contemplated by this Agreement, then notwithstanding any other provision herein, the Lender's obligation to advance the Facilities shall forthwith be terminated and/or as the case may be if the Facilities has been utilised, the Borrower shall on demand forthwith repay the Facilities in full together with accrued interest thereon and any amount payable hereunder to the Lender.

[59] In my judgment the highlighted words in s 16.03 show that there are two limbs to the section. First, there should be a request or direction or requirement from Bank Negara which, in this case, I find the guideline issued on 16 December 1997 was such a request or direction, and secondly the defendant must hold the view that it has or will become unlawful or it is prohibited or prevented by the guideline to maintain the term loan facility.

[60] As far as the second limb of the section is concerned, counsel for the plaintiff submitted that there is no evidence that the defendant had carried out a review or reassessment by virtue of the said clause and therefore the defendant did not resort to s 16.03 in initially cancelling and then reducing the term loan. According to counsel for the plaintiff, Mr Wong (PW1) testified that it was the defendant's Credit Evaluation Department that had made the decision which was conveyed to Mr Wong for him to inform the plaintiff of it, but Mr Wong not being in that department, he was in no position to know the decision making process of the Credit Evaluation Department and that the only person who could give evidence whether a reassessment had been made or on the decision making process would be an officer of that department. According to counsel there was no evidence that the officers in the defendant's Credit Evaluation Department had any expertise in costing of development projects and since no officer of the defendant's Credit Evaluation Department was called to testify that it had indeed reassessed the viability of the plaintiffs project, the court should invoke s 114(g) Evidence Act 1950 and conclude that any such officer's evidence would be adverse to the defendant's case. I do not agree.

[61] In my judgment what the second limb of s 16.03 requires is that by reason of the request or directions contained in Bank Negara's guideline of 16 December 1997 the defendant decided that it was prohibited or prevented from maintaining or giving effect to its obligations under the facility agreement. How the plaintiff arrived at its decision or by what process it arrived at the views it formed are, in my view, matters of internal management which the plaintiff was fully entitled to make under the terms of s 16.03 which does not require the defendant to reveal how it arrived at its decision.

[62] It is the evidence of Mr Wong that under the changed economic circumstances then prevailing and guided by the Bank Negara guideline, the defendant's Credit Evaluation Department took the view that the plaintiffs project was caught by the guidelines and reviewed the banking facilities granted to the plaintiff and noting that construction had not started decided to cancel the term loan and informed him of their decision. I accept what Mr Wong said on the matter. Given the fact that the guideline states that at a time when liquidity in the banking system is tight and available liquidity must be used for 'purposes that maximise' its benefits to the economy; that banks are required to use their discretion in a judicious manner to deny credit for less productive activities and be very selective in lending to the property sector; that no credit facilities should be granted to property projects where construction has not started, I find that the defendant's Credit Evaluation Department was well entitled to come to the decision that it should terminate the term loan to the plaintiff. I find that in doing so the defendant had acted by reason of both, the guidelines and its rights under s 16.03.

[63] It was also submitted on behalf of the plaintiff that if the guidelines applied, then the defendant must comply with it in full; there could be no partial compliance. It was argued that since the defendant had reduced the term loan to RM500,000 this showed that the defendant itself did not regard the guidelines as applying to the plaintiffs project. I do not agree. This submission conveniently overlooks a basic fact, namely, that the defendant's decision was to cancel the term loan. It was only because of the appeal by the plaintiff (which Mr Pang agrees he made) that the defendant relented. So the reduction came about for that reason and not because of the reason suggested by the plaintiff.

[64] For all the above reasons I find that the second issue must be answered in the affirmative.

ISSUE NO 1

Whether the defendant had wrongfully reduced the term loan facility of RM2,000,000 to RM500,000 by misrepresentation through its letter dated 9 February 1998 that 'in line with the Bank Negara's guidelines dated 16 December 1997 your term loan facility of RM2,000,000 is reduced to RM500,000 with immediate effect.

ISSUE NO 5

Whether the defendant had forced and/or coerced the plaintiffs director, Mr Pang Neng Ung to sign on the defendant's letter dated 9 February 1998 at the defendant's manager's

office at Jalan Pending by exerting severe economic pressure/duress and/or undue influence and/or force that if the plaintiff refused to sign the defendant's said letter dated 9 February 1998 the defendant will not disburse any money at all regarding the plaintiffs claim for drawdown of RM564,000 under the term loan facility for the earth filling works?

ISSUE NO 6

Whether the defendant had made any representation to the plaintiff on the Bank Negara Malaysia's guidelines and if so, whether the said representation was false and made by the defendant negligently and/or fraudulently and either well knowing that they were false and untrue or recklessly not caring whether they were true or false?

ISSUE NO 7

If the defendant had made any representation to the plaintiff on Bank Negara Malaysia's guidelines which was false, did the plaintiff rely or act on the said representation and was thereby induced to sign the defendant's said letter dated 9 February 1998 or did the plaintiff sign the said letter relying on his own judgment of the economic circumstances and on the information on the Ministry of Finance economic measures received from the mass media?

ISSUE NO 9

Whether the plaintiff is estopped by its unconditional acceptance of the reduction of the term loan facility and by its conduct in paying the monthly instalments of RM9,998 promptly until May 1999 and in applying for the restructuring of the overdraft facility vide its letter dated 24 March 1998 from claiming that the defendant had breached its fiduciary and/or contractual duties as bankers to the plaintiff?

[65] The above issues are all related and have to do with the alleged misrepresentation by the defendant and the pressure allegedly applied on Mr Pang to accept the reduced term loan. I will deal with them together.

[66] In framing issue no 1, the alleged misrepresentation complained of is identified as what the defendant had stated in its letter of 9 February 1998, namely, that *in line with the Bank Negara's guidelines dated 16 December 1997, your term loan facility of RM2,000,000 is reduced to RM500,000 with immediate effect*. But the evidence shows that even before this letter, Mr Pang had already been informed by Mr Wong about the defendant's decision to cancel the term loan because of Bank Negara's guideline, and, Mr Pang admitted in his cross-examination that he was well aware of the economic crisis facing the country in 1997. Further, by the time Mr Pang received the defendant's letter of 9 February 1998 Mr Pang already knew that Mr Wong had taken up his appeal with the defendant's head office. In the circumstances I just do not see how it can be said that there was misrepresentation by the defendant in the manner alleged, or how by saying what it did in its letter of 9 February 1998 the defendant had misrepresented the purport and intent of the guidelines as alleged. The evidence shows that Bank Negara did issue its guidelines on 16 December 1997; that the defendant was obliged to abide by these guidelines; that the defendant's Credit Evaluation Department did by reason of the guidelines decide to cancel the term loan, but was prepared to offer the plaintiff a reduced sum

on appeal by the plaintiff itself. In my judgment there simply was no misrepresentation by the defendant as alleged.

[67] As further indication that there was no misrepresentation as alleged, I refer to the following events. If the plaintiff felt that there had been misrepresentation on the part of the defendant on 9 February 1997 then it is most odd that the plaintiff would still ask the defendant to restructure its overdraft facility and request for a loan of RM1.7m for Nasteel, and, keep paying the monthly repayments on the term loan.

[68] The truth of the matter I find is that Mr Pang was a very well informed person. He kept himself informed through the newspapers. He was well aware of the measures taken by Bank Negara during the economic crisis of 1997. Accordingly I find that Mr Pang was not induced by the alleged or any misrepresentation into accepting the offer of the reduced term loan.

[69] Mr Pang seems to suggest by his evidence that there was something wrong in Mr Wong insisting that there was a Bank Negara guideline, but I cannot see anything wrong in Mr Wong insisting on something that was true.

[70] With regard to the guidelines itself, Mr Pang says he asked for a copy of the guideline and it was refused him, But he does not say when he asked for the guideline. He could easily have been more precise but deliberately chose to be vague on the point. I do not believe he asked Mr Wong for the guideline. I prefer Mr Wong's evidence that Mr Pang never asked for the guidelines. It is consistent with the fact that when the plaintiffs lawyer asked to be furnished a copy of the guidelines in his letter of 30 July 1999, that letter did not mention at all that Mr Pang had asked for a copy earlier but was refused it. If it was really true that Mr Pang had asked for a copy earlier but was refused it, then given the fact that by 30 July 1999 the plaintiff had already 'declared war' on the defendant and had begun hurling accusations against the defendant, the alleged refusal to be given a copy of the guidelines would surely have formed one of the accusations, but it strangely did not.

[71] With regard to the plaintiffs allegation that Mr Pang had been forced and coerced by the defendant into signing acceptance of the reduced Term Loan because severe economic pressure, duress and undue influence was exerted on him at the defendant's office, I find no truth in the allegations made by Mr Pang. I say so for the following reasons.

[72] According to Mr Pang he was under severe economic duress/force/pressure/undue influence to sign the letter of 9 February 1998 because Mr Wong informed him that if he declined to sign, the defendant would not disburse any money at all of the term loan thereby leading to the plaintiff being unable to pay its earth works contractor. I find this assertion of Mr Pang highly improbable and unbelievable because it is his own evidence that on being informed by Mr Wong that the term loan was to be cancelled, he appealed to Mr Wong not to withdraw the term loan facility wholly. Mr Pang went on to say that Mr Wong suggested that RM500,000 would be released to part finance the earth works. Mr Wong says it was Mr Pang who suggested that the plaintiff be allowed to draw down RM500,000 to

pay its earth works contractor. Assuming for the purpose of argument that it was Mr Wong who suggested the amount, the fact of the matter remains that at that point in time Mr Pang already knew that the defendant would consider his appeal and that if the defendant did favourably consider his appeal, he would be allowed to draw down RM500,000. Therefore, on 9 February 1998 when the defendant offered him something he was already expecting to receive and anticipating, he could not possibly be under the duress which he complains about when he accepted the reduced term loan.

[73] Another reason for disbelieving Mr Pang's accusation that he was coerced and forced into signing at Mr Wong's office, is the fact that the defendant required two authorised signatories of the plaintiff to signify its acceptance of the reduced facility. Mr Dennis Lau was that other signatory. It stands to reason that if the defendant had to force and coerce Mr Pang into signing, it would need to do the same to Mr Dennis Lau after all he too was a director of the plaintiff and according to Mr Pang the company needed to pay its earth works contractor. But there is no evidence that pressure of any sort was exerted on Mr Lau to sign. Accordingly there can be no truth in the plaintiffs allegation of coercion.

[74] With regard to whether the plaintiff should be estopped from now claiming that the defendant had breached its fiduciary and or contractual duties as banker to the plaintiff, it must follow from my findings, namely, that no pressure of any sort was applied on the plaintiff to accept the reduced facility; that there was no misrepresentation by the defendant as alleged; that the plaintiff was quite happy to pay the RM9,998 monthly repayments until May 1999 and to want to continue to do business with the defendant by applying to restructure its overdraft facilities and even apply for a loan for Nasteel, that I find that estoppel would operate against the plaintiff in the manner sought by the defendant.

[75] For all the reasons stated above I would answer the issues in the following manner:

[76] Issue No 1, must be answered in the negative. There was no wrongful reduction of the facility and no misrepresentation; issue No 5, must be answered in the negative; issue Nos 6 & 7 must be answered in the negative. There was no false, negligent or fraudulent representation by the defendant; Mr Pang signed the letter of 9 February 1998 relying on his own judgment of the economic circumstances and information from the mass media; and issue No 9 must be answered in the affirmative.

ISSUE NO 8

Whether the defendant as a banker has breached its fiduciary and contractual duties to the plaintiff as a customer?

[77] I now turn to consider issue No 8. For the reasons appearing above it must follow that this issue must also be answered in the negative.

[78] There are still issues Nos 4, 10, 11 and 12 that remain to be considered but I find that they are only relevant if I find that the plaintiff has on a balance of probabilities proved its case on misrepresentation and breach of fiduciary and or contractual duties to the part of the defendant. From all the reasons given for my findings on all the other issues already discussed, I find that the plaintiff has not proved its case against the defendant. I find the defendant has not been in breach of any of the matters alleged nor of misrepresentation. In the result I would dismiss the plaintiffs action with costs to the defendant.

[79] For completeness, if I have been wrong in my findings I will address the remaining issues.

ISSUE NO 4

Whether at the time of the reduction of the term loan facility; (i) the plaintiff intended to or was in the position to commence construction works on the project or; (ii) whether the project was then an ongoing project or viable in the changed economic conditions?

ISSUE NO 11

Did the defendant's reduction of the term loan facility result in or force the plaintiff to abandon the project sometime at or about end of June 1999?

[80] I will deal with these two issues together as they relate to the question of causation of the alleged losses suffered by the plaintiff.

[81] In addition to my earlier finding that the plaintiff did not have the necessary approvals to commence construction works of its project, there are two other reasons why I find that when the term loan was reduced by the defendant, even though the plaintiff may have intended to commence construction works on the project, it was not in a position to do so.

[82] First, the earthworks, let alone the retaining wall and infrastructure works, were not near completed. According to the plaintiff it requested for a drawdown of RM564,000 of the term loan only after it completed the earthworks on the said lands. As evidence of such completion the plaintiff relied upon the following documents:

(1) the first claim of Eik Li Equipment Services Sdn Bhd ('the earthworks contractor') dated 15 November 1997 for RM141,000;

(2) the second and final claim of the earthworks contractor dated 2 January 1998 for RM564,000;

(3) Certificate of Akitek TT Tang dated 9 January 1998 *certifying the completion of site preparation of the project to 7.5 m above sea level.*

[83] On considering these documents more closely I find that they are of no evidential value. I say so for the following reasons. The earth works contractor was appointed on 27 October 1997. There is absolutely no evidence about what equipment the contractor had employed for the job but it was expected to clear the

site, supply earth, transportation and level to a platform of 7.5 m above sea level, on all 23.5 acres of the said lands. There is also no evidence of where the earth fill was to be sourced from and over what distance the fill needed to be transported. On 15 November 1997 the contractor submitted his first claim for having completed 30% of the works. By 2 January 1998 ie, within another one nad a half months it submitted its second and final claim for having completed 100% of the earth works. I find this very difficult to believe. Although the architect has issued his certificate, for the reasons I have given and will give shortly, I find I can place no reliance on it. In my view his certificate and the contractor's claims are spurious.

[84] My doubts about the completion of the earth works are confirmed by DW3 who is a quantity surveyor who visited the said lands in January 2000 and who says in her report that the earth works were not complete, in that, DW3 said that trees and other vegetation had not yet been cleared on parts of the said lands and site clearing works do not appear to have been carried out by Sungei Semengo which cuts through the north side of the said lands. Significantly, DW3 says it could not be ascertained whether the earth fill was to 7.5 m above sea level because to her knowledge no survey of levels on site (of earth work done) had been carried out yet, Mr Pang himself admitted in cross-examination that the plaintiff had not deposited with the Land & Survey Department the survey deposited plans for the subdivision plans to be conclusively approved. Further, in the light of Mr Pang's open admission during cross-examination that the earth works were not fully completed, my finding that the architect's certificate and supporting documents are spurious documents is fully borne out.

[85] My second reason for saying that the plaintiff was not in a position to commence construction works has to do with the plaintiffs ability to fund the other works necessary to prepare the site to be built on. It will be recalled that the term loan was only to part finance earth filling, construction of retaining wall and infrastructure. The plaintiffs consultants ATS Services themselves estimated clearing and infrastructure works to cost RM3,740,000 while DW3 estimated it at RM4,700,000. Whichever figure is used, since the defendant had agreed to finance RM2m of those costs, the plaintiff would need to fund at least RM1,740,000 if not RM2.7m to complete these works.

[86] The plaintiffs 'Management Report' shows that the plaintiff intended to finance these works through the sales of its houses, but with the changed economic situation and with all financial institutions tightening their lending to the property sector I doubt the plaintiff would have been in a position to finance the completion of these works whether from borrowings or through sales.

[87] Accordingly for the above reasons I would answer the issue by saying that at the time of the reduction of the term loan, the plaintiff was not in a position to commence construction and that the project was then not an ongoing project with the earth works not completed, and the plaintiff not being in a position to undertake the rest of the infrastructure works.

I would answer the 11th issue by saying that the defendant's reduction of the term loan did not result in or force the plaintiff to abandon the project.

ISSUE NO 10

Whether the transfer of the said lands on or about 7 January 2000 from Pradom Development Sdn Bhd to Besthouse Development (M) Sdn Bhd was a bona fide arm's length sale-transaction?

[88] In my judgment it was not. I say so for the following reasons. I agree with Mr Tang of counsel for the defendant that the sale was entered into to generate evidence of loss for the purposes of this case.

[89] It is the plaintiffs case that it had bought the said lands for RM5.5m but was forced to sell at RM3m and so it suffered a loss of RM2.5m which it has claimed as special damages against the defendant.

[90] To me it makes little sense and even less business sense that having bought the said lands for RM5.5m and then improved them by carrying out earth filling and land clearing up to the alleged value of RM705,000 and then further enhancing its worth by revising the subdivision plans so that even before the enhancement Messrs C H Williams Talhar Wong & Yeo Sdn Bhd valued the said lands at RM7m (in September 1997 when the economic crisis was raging), which Mr Pang admitted to in cross-examination, that the plaintiff should want to sell the said lands at a loss.

[91] Although Mr Pang said it was a prudent decision to sell the said lands for RM3m because the plaintiff was indebted to the defendant in the sum of RM2.577m in 1999, in the light of the evidence I have just referred to, I find that the said lands were far more valuable than the amount owed to the defendant. Accordingly I do not accept what Mr Pang said as a valid reason for the sale.

[92] It is interesting to note that Mr Pang never said that the plaintiff had obtained a professional valuer's opinion in deciding on the selling price. But what Mr Pang did say was that he made an informal inquiry with the valuation section of the Land and Survey Department and was told the total valuation for transfer would be RM3m. I do not attach any weight to this part of Mr Pang's evidence. In the first place it is hearsay. In the second place the information was supplied by an unidentified person in response to an informal enquiry and so the person giving it cannot be expected to have made a formal or proper assessment. In the third place I find Mr Pang's evidence unworthy of belief as it is self serving, particularly so in the light of the fact that the plaintiff had a valuation report undertaken by Messrs C H William Talhar Wong & Yeo Sdn Bhd on 23 September 1997 showing the said lands were valued at RM7m even during the economic crisis.

[93] Of course the third reason given by Mr Pang for selling at RM3m was that the purchaser offered only RM3m. But the purchaser here was Mr Pang's own family company, No weight can be placed on such evidence.

[94] It is for all the above reasons that I agree with counsel for the defendant that the sale of the said lands at a loss was not a bona fide transaction.

ISSUE NO 12

Whether the plaintiff had suffered the special damages claimed and/or any damages at all?

[95] In my judgment the plaintiff did not do so. I say so for the following reasons.

[96] As far as the alleged loss of RM2.5m sustained on the sale of the said lands is concerned I have already said why there could not be such loss.

[97] As far as the sum of RM1,500,000 representing 'shareholders' injections' is concerned, there is not an iota of evidence that such an amount was paid into the plaintiff.

[98] As far as the sum of RM5,442,459 which is claimed as loss of profit from the said project is concerned, I find such loss not proved, I find that it was not the natural and probable result of the defendant's alleged breach nor was it foreseeable in the circumstances of this case. It must not be overlooked that here, the purpose of the term loan was not even to finance the earth filling, construction of retaining wall and infrastructure but to only part finance those works and constituted only a very small portion of the total project cost, While I accept it that it would be reasonable to expect and foresee that if the term loan was wrongfully reduced the plaintiff would experience some delay to its earth works and infrastructure works and consequently to the project itself and that the plaintiff would also be put to extra expense of securing alternative financing, it would be unreasonable to expect the defendant to foresee that its reduction of the term loan would result in the plaintiff abandoning the project. Such a consequence was just too remote in the circumstances of this case. Further, the abandoning of the project by the plaintiff could not possibly be a natural and probable result of the defendant's alleged breach given the fact that plaintiff did not depend entirely on the defendant to finance the project; not even the whole of the infrastructure works. It is for this reason that I have not found the case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v MAE Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 (SC) of any assistance to the plaintiffs case. The facts there are so different to the facts here.

[99] I also find the sum of RM5,442,459 not proved as special damages. Here the alleged loss is based entirely on certain mathematical calculations based on projected and assumed figures. I find the expectations of profits stated in ATS Services report to be too speculative and uncertain to be of any evidential value. For example the profits anticipated will never be achieved if the houses cannot be sold at the prices and times stated in the report.

[100] It is one thing for the management report such as ATS Services' report to be used by a financial institution in deciding whether or not to grant a loan and quite another thing for the same report to be accepted by a court as proof of a loss actually suffered, While such a report may be acceptable as a tool in assessing viability of a

project and therefore relevant when assessing general damages, it certainly cannot constitute evidence of actual loss for the simple reason that it is not based on established facts.

[101] In the result I have not found that the plaintiff has suffered any of the loss or damage claimed.

Order accordingly.

Reported by Sally Kee